Table 6 presents the classification for sources and uses of capital required under Section 15. These classifications replace capital information previously required on the balance sheet and capital subsidiary schedule.

TABLE 6.—CAPITAL FUNDING

Sources of Capital
Federal Funds
State Funds
Local Funds
Transit Agency Funds
Uses of Capital
Revenue Vehicles
Transit Way and Facilities
Other Capital Expenses

The Uniform System of Accounts and Records also includes collecting and recording of certain operating data elements. The basic operating data elements are listed in Table 7.

TABLE 7.—OPERATING DATA ELEMENTS

Revenue Vehicles Maintenance Performance and Energy Consumption
Roadcalls for Mechanical Failure
Roadcalls for Other Reasons
Labor Hours for Inspection and Maintenance
Number of Light Maintenance Facilities
Energy Consumption
Transit Way Mileage
Fixed Guideway Classifications for Rail and Non-rail Modes
Directional Route Miles
Miles of Track
Number of Crossings
Number of Stations
Average Monthly Directional Route Miles
Employee Equivalents
Operating and Capital Employee Equivalents for Labor
Classifications
Part-time Labor
Transit System Accidents
Collisions
Non-Collisions
Station Accidents
Service Supplied
Number of Vehicles, Trains, and Passenger Cars in Operation
Total Actual Vehicle, and Passenger Car Revenue Miles
Total Scheduled Vehicle, and Passenger Car Revenue Miles
Total Actual Vehicle, Train, and Passenger Car Revenue Miles
Miles of Charter and School Bus Service
Total Actual Vehicle, Train, and Passenger Car Revenue Hours
Total Actual Vehicle, Train, and Passenger Car Hours
Hours of Charter and School Bus Service
Service Consumed
Unlinked Passenger Trips
Passenger Miles [1]
Service Personnel Classifications
Service Operated and Nonoperated (Days) Classifications
Revenue Vehicle Inventory

[1] Sampling or other procedures that meet prescribed precision and confidence levels need only be applied every third year by reporters who meet the following criteria: (a) Operate in urbanized areas of less than 500,000 population; (b) Directly operate less than 100 revenue vehicles for all modes in maximum service; or (c) Operate purchased transportation service and do not submit a separate Section 15 report.

The definitions for the above expense object classes, functions, revenue object classes, balance sheet object classes, and operating data elements are contained in the reference volumes.

F. The Reporting System

(1) The section 15 Reporting System consists of forms and procedures for transmitting data from transit agencies to UMTA. All beneficiaries of Federal financial assistance must submit the required forms and information in order to allow UMTA to: (1) Store and generate information on the Nation's mass transportation systems; and (2) calculate apportionment allocations for the section 9 formula grant program (for urbanized areas of 200,000 or more inhabitants). Agencies submitting Section 15 reports may only submit data for transit services which they directly operate and purchase under contract from public agencies and/or private carriers.

Separate and complete Section 15 reports must be submitted by or for each purchased transportation service provider that operates 100 or more revenue vehicles for the purchased service during the maximum service period. The reporting requirements include the following major segments, which are based on information assembled through the Uniform System of Accounts and Records:

1. Capital report.
2. Revenue report.
3. Expense report.
4. Nonfinancial operating data reports.
5. Miscellaneous auxiliary questionnaires and subsidiary schedules.
6. Data certifications.

(2) The following Table 8 lists all reporting forms to be filed by all reporting agencies:

TABLE 8.—MINIMUM (M) LEVEL REPORTING FORMS

Basic Information Forms:
Transit System Identification
Contractual Relationship Identification
Supplemental Information
Capital Report Forms:
Capital Funding
Revenue Report Forms:
Revenue Summary
Sources of Funding for Operations
Expense Report Forms:
Expenses Classified by Function
Operators' Wages
Fringe Benefits
Nonfinancial Operating Data Report Forms:
Revenue Vehicle Maintenance Performance and Energy Consumption
Transit Way Mileage
Transit System Employee Equivalents
Transit System Safety
Transit System Service
Revenue Vehicle Inventory
Summary Form:
Section 9 Statistics

(3) The section 15 Reporting System includes several data certification requirements.

(a) Financial Data Certification

Reporting agencies must submit with their section 15 report a letter or report signed by an independent public accountant or other responsible independent entity such as a state audit agency. This statement must attest to the conformity, in all material respects of the financial data reporting forms in the Section 15 report with the Uniform System of Accounts and Records and Reporting System. The letter or report shall also state whether any of the reporting forms do not conform to the Section 15 requirements, and describe the discrepancies.

(b) Section 9 Data Certification

Certification of the data used to apportion section 9 funds is required for section 15 reports covering 100 or more vehicles operated in maximum service by all modes that are in or serve urbanized areas with populations of 200,000 or more. All section 9 data (directly operated as well as purchased service) in the report will be certified. This section 9 data certification must be signed by an independent auditor. The data used to apportion section 9 funds are: Directional route miles, vehicle revenue miles, passenger miles, and operating cost.

(c) The Chief Executive Officer (CEO) Certification

The CEO of each reporting agency is required to submit a certification with each annual section 15 report. The certification must attest:

—To the accuracy of all data contained in the section 15 report;
—That all data submitted in the section 15 report are in accord with Section 15 definitions;
—If applicable, that the reporting agency's accounting system used to derive all data submitted in the section 15 report is the section 15 Uniform System of Accounts and Records and that a section 15 report using this system was certified by an independent auditor in a previous report year;
—If applicable, the fact that the reporting agency's internal accounting system is other than the Uniform System of Accounts and Records, and that its: (i) Accounting system uses the accrual basis of accounting, (ii) accounting system is directly translated, via a clear audit trail, to the accounting treatment and categories specified by the section 15 Uniform System of Accounts and Records, and (iii) accounting system and direct translation to the Uniform System of Accounts and Records are the same as those certified by an independent auditor in a previous reporting year; and
—That a 100% count of passenger mile data was conducted or that the sampling method used to collect passenger mile data for each mode/type of service meets UMTA requirements.

Issued On: August 1, 1991.

Brian W. Clymer,

Administrator.

[FR Doc. 91-18723 Filed 8-9-91; 8:45 am]

BILLING CODE 4910-57-M

federal register

Monday
August 12, 1991

Part IV

Department of Education

Commercial Drivers Education Program; Applications for New Awards for Fiscal Year 1992; Notice

DEPARTMENT OF EDUCATION

[CFDA No.: 84.247]

Commercial Drivers Education Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 1992

Note to Applicants: This notice is a complete application package. Together with the statute authorizing the program and the Education Department General Administrative Regulations (EDGAR), the notice contains all of the information, application forms, and instructions needed to apply for a grant under this competition.

Purpose of Program: To increase the literacy skills of eligible commercial drivers so that those drivers may successfully complete the knowledge test requirements under the Commercial Motor Vehicle Safety Act of 1986. The term eligible commercial driver means a commercial driver licensed prior to the requirements of the commercial Motor Vehicle Safety Act of 1986.

Eligible Applicants: The following entities are eligible for an award under this program:

(a) Private employers employing commercial drivers in partnership with local educational agencies, State educational agencies, colleges, universities, or community colleges.

(b) Local educational agencies, State educational agencies, colleges, universities, or community colleges.

(c) Approved apprentice training programs. The term "approved apprentice training programs" has the meaning given this term in the National Apprenticeship Act of 1937.

(d) Labor organizations, the memberships, of which include commercial drivers.

Cost Sharing is required by the statute authorizing this program. The non-Federal share required refers to 50 percent of the total project cost including both Federal and non-Federal funds.

Grantees shall refer to appropriate adult education programs authorized under other portions of the Adult Education Act those individuals who are identified as having literacy skill problems beyond those which prevent them from successfully completing the knowledge test requirements under the Commercial Motor Vehicle Safety Act of 1986.

Deadline for Transmittal of Applications: 10/11/91.

Deadline for Intergovernmental Review: 12/11/91.

Available Funds: $1,951,975.

Estimated Range of Awards: $150,000–$200,000.

Estimated Average Size of Awards: $195,000.

Estimated Number of Awards: 10.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 18 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR part 74 (Administration of Grants to Institutions of Higher Education, Hospitals and Nonprofit Organizations), part 75 (Direct Grant Programs), part 77 (Definitions that Apply to Department Regulations), part 79 (Intergovernmental Review of Department of Education Programs and Activities), part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), part 81 (General Education Provisions Act—Enforcement), part 82 (New Restrictions on Lobbying), part 85 (Government-Wide Debarment and Suspension (Nonprocurement) and Government-Wide Requirements for Drug-Free Workplace (Grants), and part 86 (Drug-Free Schools and Campuses).

Selection Criteria

(a)(1) The Secretary uses the following selection criteria to evaluate applications for new grants under this competition.

(2) The maximum total score for all of these criteria is 100 points.

(3) The maximum score for each criterion is indicated in parentheses.

The Secretary assigns the fifteen points, reserved in 34 CFR 75.210(c), as follows: 10 points to selection criterion (3)—Plan of Operation—in 34 CFR 75.210(b)(3) for a total of 25 points for that criterion; and 5 points to selection criterion (4)—Quality of key personnel—in 34 CFR 75.210(b)(4) for a total of 12 points for that criterion.

(b) *The criteria*—(1) *Meeting the purposes of the authorizing statute.* (30 points) The Secretary reviews each application to determine how well the project will meet the purpose of the Adult Education Act, including consideration of:

(i) The objective of the project; and

(ii) How the objectives of the project further the purposes of the Adult Education Act.

(2) *Extent of need for the project.* (20 points) The Secretary reviews each application to determine the extent to which the project meets specific needs recognized in the Adult Education Act, including consideration of—

(i) The needs addressed by the project;

(ii) How the applicant identified those needs;

(iii) How those needs will be met by the project; and

(iv) The benefits to be gained by meeting those needs.

(3) *Plan of Operation.* (25 points) The Secretary reviews each application to determine the quality of the plan of operation, including—

(i) The quality of the design of the project;

(ii) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(iii) How well the objectives of the project relate to the purpose of the program;

(iv) The quality of the applicant's plan to use its resources and personnel to achieve each objective; and

(v) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapping condition.

(4) *Quality of key personnel.* (12 points)

(i) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(A) The qualifications of the project director (if one is to be used);

(B) The qualifications of each of the other key personnel to be used in the project;

(C) The time that each person referred to in paragraph (b)(4)(i) (A) and (B) will commit to the project; and

(D) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(ii) To determine personnel qualifications under paragraphs (b)(4)(i) (A) and (B), the Secretary considers—

(A) Experience and training in fields related to the objectives of the project; and

(B) Any other qualifications that pertain to the quality of the project.

(5) *Budget and cost effectiveness.* (5 points) The Secretary reviews each application to determine the extent to which—

(i) The budget is adequate to support the project; and

(ii) Costs are reasonable in relation to the objectives of the project.

(6) *Evaluation plan.* (5 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent

to which the applicant's methods of evaluation—

(i) Are appropriate to the project; and

(ii) To the extent possible, are objective and produce data that are quantifiable.

(Cross-reference: See 34 CFR 75.590 Evaluation by the grantee)

(7) *Adequacy of resources.* (3 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

Intergovernmental Review of Federal Programs: This program is subject to the requirements of Executive Order 12372 (Intergovernmental Review of Federal Programs) and the regulations in 34 CFR part 79.

The objective of the Executive Order is to foster an intergovernmental partnership and to strengthen federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financal assistance.

Applicants must contact the appropriate State Single Point of Contact to find out about, and to comply with, the State's process under Executive Order 12372. Applicants proposing to perform activities in more than one State should immediately contact the Single Point of Contact for each of those States and follow the procedure established in each State under the Executive Order. If you want to know the name and address of any State Single Point of Contact, see the list published in the **Federal Register** on September 17, 1990, pages 38210–38211.

In States that have not established a process or chosen a program for review, State, areawide, regional, and local entities may submit comments directly to the Department.

Any State Process Recommendation and other comments submitted by a State Single Point of Contact and any comments from State, areawide, regional, and local entities must be mailed or hand-delivered by the date indicated in this notice to the following address: The Secretary, Executive Order 12372—CFDA# 84.247, U.S. Department of Education, room 4161, 400 Maryland Avenue, SW., Washington, DC 20202–0125.

Proof of mailing will be determined on the same basis as applications (see 34 CFR 75.102). Recommendations or comments may be hand-delivered until 4:30 p.m. (Washington, DC time) on the date indicated in this notice.

Please Note that the Above Address is not the Same Address as the One to Which the Applicant Submits its Completed Application. *Do Not Send Applications to the Above Address.*

Instructions for Transmittal of Applications

(a) If an applicant wants to apply for a grant, the applicant shall—

(1) Mail the original and two copies of the application on or before the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA# 84.247), Washington, DC 20202–4725.

or

(2) Hand deliver the original and two copies of the application by 4:30 p.m. (Washington, DC time) on the deadline date to: U.S. Department of Education, Application Control center, Attention: (CFDA# 84.247), room #3633, Regional Office Building #3, 7th and D Streets, SW., Washington, DC 20202–4725.

(b) An applicant must show one of the following as proof of mailing:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(c) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Notes: (1) The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

(2) The Application Control Center will mail a Grant Application Receipt Acknowledgement to each applicant. If an applicant fails to receive the notification of application receipt within 15 days from the date of mailing the application, the applicant should call the U.S. Department of Education Application Control Center at (202) 708–9494.

(3) The applicant *must* indicate on the envelope and—if not provided by the Department—in Item 10 of the application for Federal Assistance (Standard Form 424) the CFDA number of the competition under which the application is being submitted.

Application Instructions and Forms

The appendix to this notice is divided into four parts plus a statement regarding estimated public reporting burden and various assurances and certifications. These parts and additional materials are organized in the same manner that the submitted application should be organized. The parts and additional materials are as follows:

Part I: Application for Federal Assistance (Standard Form 424 (Rev. 4–88)) and instructions.

Part II: Budget Information—Non-Construction Programs (Standard Form 424A) and instructions.

Part III: Application Narrative.

Part IV: Partners' Agreement Form

Additional Materials

Estimated Public Reporting Burden.

Assurances—Non-Construction Programs (Standard Form 424B).

Certifications regarding Lobbying; Debarment, Suspension, and Other Responsibility Matters, and Drug-Free Workplace Requirements (ED Form 80–0013) and instructions.

Certification regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion: Lower Tier Covered Transactions (ED Form 80–0014) and instructions. (NOTE: ED Form 80–0014 is intended for the use of grantees and should not be transmitted to the Department).

Disclosure of Lobbying Activities (Standard Form LLL) (if applicable) and instructions, and Disclosure of Lobbying Activities Continuation Sheet (Standard Form LLL–A).

All forms and instructions are included in the Appendix to this notice.

An applicant may submit information on a photostatic copy of the application and budget forms, the assurances, the certifications and Partners' agreement form. However, the application form, the assurances, the certifications and Partners' agreement form must each include an original ink signature. No grant may be awarded unless a complete application form has been received.

All applicants must submit ONE original signed application, and at least two copies of the application. Please mark each application as original or copy. No grant may be awarded unless a complete application form has been received.

FOR FURTHER INFORMATION CONTACT: Marian Banfield, Special Programs Branch, Division of National Programs, Office of Vocational and Adult Education, U.S. Department of Education, room 4512–MES, 400 Maryland Avenue SW., Washington, DC 20202–7327. Telephone (202) 732–1838. Or Carroll Towey, Program Services Branch, Division of Adult Education and Literacy, Office of Vocational and Adult Education, U.S. Department of Education, room 4425–MES, 400 Maryland Avenue SW., Washington, DC 20202–7320. Telephone (202) 732–2391. Deaf and hearing impaired individuals may call the Federal Dual Party Relay

Service at 1–800–877–8339 (in the Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m., Eastern time.

Program Authority: 20 U.S.C. 1211(b).

Dated: August 5, 1991.

Betsy Brand,

Assistant Secretary, Office of Vocational and Adult Education.

BILLING CODE 4000-01-M

APPENDIX

OMB Approval No. 0348-0043

APPLICATION FOR FEDERAL ASSISTANCE

	2. DATE SUBMITTED	Applicant Identifier
1. TYPE OF SUBMISSION: Application ☐ Construction ☒ Non-Construction; Preapplication ☐ Construction ☐ Non-Construction	3. DATE RECEIVED BY STATE	State Application Identifier
	4. DATE RECEIVED BY FEDERAL AGENCY	Federal Identifier

5. APPLICANT INFORMATION

Legal Name:	Organizational Unit:
Address (give city, county, state, and zip code):	Name and telephone number of the person to be contacted on matters involving this application (give area code)

6. EMPLOYER IDENTIFICATION NUMBER (EIN): ☐☐ – ☐☐☐☐☐☐☐

7. TYPE OF APPLICANT: (enter appropriate letter in box) ☐

A. State; B. County; C. Municipal; D. Township; E. Interstate; F. Intermunicipal; G. Special District; H. Independent School Dist.; I. State Controlled Institution of Higher Learning; J. Private University; K. Indian Tribe; L. Individual; M. Profit Organization; N. Other (Specify): _____

8. TYPE OF APPLICATION:

☐ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es): ☐ ☐

A. Increase Award; B. Decrease Award; C. Increase Duration; D. Decrease Duration; Other (specify): _____

9. NAME OF FEDERAL AGENCY:

U.S. Department of Education/OVAE

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: 8 4 • 2 4 7

TITLE: COMMERCIAL DRIVERS EDUCATION PROGRAM

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:

12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.):

13. PROPOSED PROJECT: Start Date	Ending Date	14. CONGRESSIONAL DISTRICTS OF: a. Applicant	b. Project

15. ESTIMATED FUNDING:		
a. Federal	$	.00
b. Applicant	$	.00
c. State	$	.00
d. Local	$	.00
e. Other	$	.00
f. Program Income	$	.00
g. TOTAL	$	.00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON

DATE _____

b. NO ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes If "Yes," attach an explanation. ☐ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a. Typed Name of Authorized Representative	b. Title	c. Telephone number
d. Signature of Authorized Representative		e. Date Signed

Previous Editions Not Usable

Standard Form 424 (REV 4-88)
Prescribed by OMB Circular A-102

Authorized for Local Reproduction

INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item: Entry:

1. Self-explanatory.
2. Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable).
3. State use only (if applicable).
4. If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.
5. Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.
6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.
7. Enter the appropriate letter in the space provided.
8. Check appropriate box and enter appropriate letter(s) in the space(s) provided:
   - "New" means a new assistance award.
   - "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.
   - "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.
9. Name of Federal agency from which assistance is being requested with this application.
10. Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.
11. Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.

Item: Entry:

12. List only the largest political entities affected (e.g., State, counties, cities).
13. Self-explanatory.
14. List the applicant's Congressional District and any District(s) affected by the program or project.
15. Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.
16. Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.
17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.
18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)

SF 424 (REV 4-88) Back

BUDGET INFORMATION — Non-Construction Programs

OMB Approval No. 0348-0044

SECTION A - BUDGET SUMMARY

Grant Program Function or Activity (a)	Catalog of Federal Domestic Assistance Number (b)	Estimated Unobligated Funds		New or Revised Budget		
		Federal (c)	Non-Federal (d)	Federal (e)	Non-Federal (f)	Total (g)
1. COMMERCIAL DR.	84.247	$	$	$	$	$
2.						
3.						
4.						
5. TOTALS		$	$	$	$	$

SECTION B - BUDGET CATEGORIES

6 Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY (1)	(2)	(3)	(4)	Total (5)
a. Personnel	$	$	$	$	$
b. Fringe Benefits					
c. Travel					
d. Equipment					
e. Supplies					
f. Contractual					
g. Construction					
h. Other					
i. Total Direct Charges (sum of 6a - 6h)					
j. Indirect Charges					
k. TOTALS (sum of 6i and 6j)	$	$	$	$	$
7. Program Income	$	$	$	$	$

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Standard Form 424A (4-88)
Prescribed by OMB Circular A-102

BILLING CODE 4000-01-C

SECTION C - NON-FEDERAL RESOURCES

(a) Grant Program	(b) Applicant	(c) State	(d) Other Sources	(e) TOTALS
8. COMMERCIAL DRIVERS EDUCATION PROGRAM	$	$	$	$
9.				
10.				
11.				
12. TOTALS (sum of lines 8 and 11)	$	$	$	$

SECTION D - FORECASTED CASH NEEDS

	Total for 1st Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
13. Federal	$	$	$	$	$
14. NonFederal					
15. TOTAL (sum of lines 13 and 14)	$	$	$	$	$

SECTION E - BUDGET ESTIMATES OF FEDERAL FUNDS NEEDED FOR BALANCE OF THE PROJECT

(a) Grant Program	FUTURE FUNDING PERIODS (Years)			
	(b) First	(c) Second	(d) Third	(e) Fourth
16.	$	$	$	$
17.				
18.				
19.				
20. TOTALS (sum of lines 16 -19)	$	$	$	$

SECTION F - OTHER BUDGET INFORMATION

(Attach additional Sheets if Necessary)

21 Direct Charges:	22. Indirect Charges:
23 Remarks	

SF 424A (4-88) Page 2
Prescribed by OMB Circular A-102

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Part II—Budget Information Instructions for the SF–424A

General Instructions

This form is designed so that application can be made for funds from any one of the grant programs funded by the U.S. Department of Education. For the Commercial Drivers Education Program (CFDA No. 84.247) sections A, B, and C should include budget estimates for the entire project period.

Note: Sections D and E need not be completed to apply for this program.

All applications should contain a breakdown by the object class categories shown in sections, B, Lines 6a through 6j.

Section A. Budget Summary

Line 1. Columns (a) through (g)—Enter on Line 1 the catalog program title in Column (a) and the catalog program number in Column (b). Leave Columns (c) and (d) blank. Enter in Columns (e), (f) and (g), the appropriate amounts of funds needed to support the project for the entire project period.

Note: Grant recipients under the Commercial Drivers Education Program (CFDA No. 84.247) are required to provide 50 percent of the total cost of a project conducted under the program. In other words, the amount shown on Line 1, Column (f) must be 50 percent of the amount shown on Line 1, Column (g).

Note: Lines 2, 3, 4, and 5 of section A need not be completed to apply for this program.

Section B. Budget Categories

Lines 6a through 6i—Fill in the total requirements for Federal funds by object class categories for the entire project period in Column (1).

Note: Columns (2), (3), (4), and (5) of section B need not be completed to apply for this program.

Line 6a—Personnel: Show salaries and wages to be paid to personnel employed in the project. Fees and expenses for consultants must be included in Line 6f.

Line 6b—Fringe Benefits: Include contributions for Social Security, employee insurance, pension plans, etc. Leave blank if fringe benefits to personnel are treated as part of the indirect cost rate.

Line 6c—Travel: Indicate the amount requested for travel of employees.

Line 6d—Equipment: Applicants who are institutions of higher education, hospitals, or nonprofit organizations must indicate the cost of nonexpendable personal property which has a useful life of more than one year and an acquisition cost of $300 or more per unit. Applicants who are State or local governments must indicate the cost of nonexpendable personal property which has a useful life of more than one year and an acquisition cost of $5000 or more per unit.

Line 6e—Supplies: Include the cost of consumable supplies to be used in this project. These should be items which cost less than $300 per unit with a useful life of less than one year if an applicant is an institution of higher education, a hospital, or a nonprofit organization. If the applicant is a State or local government, list consumable items which cost less than $5000 per unit with a useful life of less than one year.

Line 6f—Contractual: Show the amount to be used for: (a) Procurement contracts (except those which belong on other lines such as supplies and equipment listed above); and (b) payments for consultants.

Line 6g—Construction: Construction expenses are not allowable under the Commercial Drivers Education Program (CFDA No. 84.247).

Line 6h—Other: Indicate all direct costs not clearly covered by Lines 6a through 6g. Trainee costs or stipends are not allowable.

Line 6i—Total Direct Charges: Show total of Lines 6a through 6h.

Line 6j—Show the amount of indirect cost to be charged to the project.

Line 6k—Enter the total of the amounts on Lines 6i and 6j.

Note: Line 7 of Section B need not be completed to apply for this program.

Section C. Non-Federal Resources

Note: Cost sharing is required by the statute authorizing this program. The non-Federal share required refers to 50 percent of the total project cost, including both Federal and non-Federal funds.

Line 8—Enter any amounts of non-Federal resources that will be used on the grant. Contributions may be in the form of cash or in-kind contributions. If any in-kind contributions are included, provide a brief explanation of each contributioin on a separate sheet.

Column (a)—Enter the catalog program title.

Column (b)—Enter the contribution to be made by the applicant. If an application is filed on behalf of a partnership, include the contributions of all partners—not merely those of the partner designated as the applicant on the Partners' Agreement Form and the SF 424. If an applicant is a State agency, the applicant's contribution should be included in column (b), rather than in column (c).

Column (c)—Enter the contribution of any State agency that is neither an applicant nor a partner in an application in which another partner has been designated as the applicant.

Column (d)—Enter the contribution to be made from all other sources.

Column (e)—Enter the totals of Columns (b), (c), and (d).

Note: The amount shown on Line 8, Column (e), should be the same as the figure shown on Section A, Line 1, Column (f).

Note: Lines 9, 10, 11, and 12 of Section C need be completed to apply for this program.

Section D. Forecasted Cash Needs

Note: This section does not apply to the Commercial Drivers Education Program.

Section E. Budget Estimates of Federal Funds Needed for Balance of the Project

Note: This section does not apply to the Commercial Drivers Education Program.

Section F. Other Budget Information

Prepare a detailed Budget Narrative that explains, justifies, and/or clarifies the budget figures shown in section A, B, and C. Explain:

1. The basis used to estimate certain costs (professional personnel), consultants, travel, indirect costs) and any other cost that may appear unusual;
2. How the major cost items relate to the proposed project activities;
3. The costs of the project's evaluation component; and
4. What non-Federal funds will be used in each budget category.

Instructions for Part III—Application Narrative

Before preparing the Application Narrative, an applicant should read carefully the description of the program and the selection criteria the Secretary uses to evaluate applications.

The narrative should encompass each function or activity for which funds are being requested, describe when the applicant plans to meet each objective of the project, and should—

1. Begin with the Abstract; that is, a summary of the proposed project;
2. Describe the proposed project in light of each of the selection criteria in the order in which the criteria are listed in this application package; and
3. Include any other pertinent information that might assist the Secretary in reviewing the application.

The Secretary strongly requests the applicant to limit the Application Narrative to no more than 30 double-spaced, typed, 8½" × 11" pages (on one side only), although the Secretary will consider applications of greater length. Be sure that each page of your application is numbered consecutively.

Include as an appendix to the Application Narrative supporting

documentation, also on 8½"×11" paper, (e.g., letters of support, footnotes, resumes, etc) or any other pertinent information that might assist the Secretary in reviewing the application.

Applicants are advised that:

(1) Under § 75.217 of the Education Department General Administrative Regulations (EDGAR), the Department considers only information contained in the application in ranking applications for funding consideration. Letters of support sent separately from the formal application package are not considered in the review by the technical review panels.

(2) In reviewing applications, the technical review panel evaluates each application solely on the basis of the established technical review criteria. Letters of support contained in the application will strengthen the application only insofar as they contain commitments which pertain to the established technical review criteria.

Include any other pertinent information that might assist the Secretary in reviewing the application under the statute authorizing this program.

Instructions for Part IV—Partners' Agreement Form

Instructions: As previously indicated, there are four categories of entites that are eligible for an award under this program. See the list of categories (a)–(d) in the description of ELIGIBLE APPLICANTS near the beginning of this Notice. Only entities in category (a) must submit a signed Partners' Agreement Form and enclose it with the application. Category (a) includes private employers employing commercial drivers in partnership with local educational agencies, State educational agencies, colleges, universities, or community colleges. The partners may designate either the private employer employing commercial drivers or the educational partner as the applicant on behalf of the partnership, however, both the designated applicant and the other partner must sign the Agreement Form. If the Form is not signed by both partners and submitted with the application, the Secretary will return the application without further consideration for funding pursuant to 34 CFR 75.216.

BILLING CODE 4000-01-M

PART IV - PARTNERS' AGREEMENT FORM FOR COMMERCIAL DRIVERS EDUCATION PROGRAM

INSTRUCTIONS: Applicants who apply as private employers employing commercial drivers in partnership with local educational agencies, State educational agencies, colleges, universities, or community colleges (category (a) in the description of Eligible Applicants near the beginning of this notice) must submit a signed Partners' Agreement Form and enclose it with the application. It is essential that both partners sign and submit this document in order for their application to be considered complete. If the document is not signed by both partners and submitted with the application, the Secretary will return the application without further consideration for funding pursuant to 34 CFR 75.216.

Applicants applying under category (b) (Local education agencies, State educational agencies, colleges, universities or community colleges); category (c) (Approved apprentice training programs); or category (d) (Labor organizations, the memberships of which include commercial drivers); as described under Eligible Applicants are not required to submit a partnership agreement as they are not required to apply in partnership with any other entity. Only applicants in category (a) must submit a Partnership Agreement Form.

Any questions concerning forming a valid partnership and properly completing the Partners' Agreement Form may be referred to one of the program officers listed as an information contact in this notice.

Partners' Agreement

As authorized representatives of our organizations, we agree on their behalf to the following terms with respect to our application number V247A as a condition of applying for and receiving a grant from the Commercial Drivers Education Program. We:

- designate partner _____ as the applicant on behalf of the partnership;
- are willing to be partners in this project;
- will perform the role detailed for each of us in the application;
- will be bound by every statement and assurance made in the application.

Partner One (business partner)	Partner Two (educational partner)
_____ Original Ink Signature	_____ Original Ink Signature
_____ Name (Typed)	_____ Name (Typed)
_____ Title (Typed)	_____ Title (Typed)
_____ Organization (Typed)	_____ Organization (Typed)
_____ Date (Typed)	_____ Date (Typed)

BILLING CODE 4000-01-C

Any questions about forming a valid partnership and properly completing the Partners' Agreement Form may be referred to one of the program officers listed as an information contact in this Notice. Remember, entities in categories (b)–(d) do not need to submit a Partners' Agreement Form because they are not required to enter into a partnership as a condition of filing an application. For example, category (b) includes local educational agencies, State educational agencies, colleges, universities, or community colleges that are applying individually rather than in partnership with a private employer under category (a); since no partnership has been established, it is not necessary for entities applying under category (b) to submit a Form.

Instructions for Estimated Public Reporting Burden

Under terms of the Paperwork Reduction Act of 1980, as amended, and the regulations implementing that Act, the Department of Education invites comment on the public reporting burden in this collection of information. Public reporting burden for this collection of information is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. You may send comments regarding this burden to the U.S. Department of Education, Information Management and Compliance Division, Washington, DC 20202–4651; and to the Office of Management and Budget, Paperwork Reduction Project, OMB 1830–0013, Washington, DC 20503.

(Information collection approved under OMB control number 1830–0013. Expiration Date: 7/31/92.)

BILLING CODE 4000–01–M

OMB Approval No. 0348-0040

ASSURANCES — NON-CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C.§§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse, (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program andto purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).

14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

SF 424B (4-88) Back

CERTIFICATIONS REGARDING LOBBYING; DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS; AND DRUG-FREE WORKPLACE REQUIREMENTS

Applicants should refer to the regulations cited below to determine the certification to which they are required to attest. Applicants should also review the instructions for certification included in the regulations before completing this form. Signature of this form provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying," and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace (Grants)." The certifications shall be treated as a material representation of fact upon which reliance will be placed when the Department of Education determines to award the covered transaction, grant, or cooperative agreement.

1. LOBBYING

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over $100,000, as defined at 34 CFR Part 82, Sections 82.105 and 82.110, the applicant certifies that:

(a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal grant or cooperative agreement;

(b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions;

(c) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all subrecipients shall certify and disclose accordingly.

2. DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions, as defined at 34 CFR Part 85, Sections 85.105 and 85.110 –

A. The applicant certifies that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default; and

B. Where the applicant is unable to certify to any of the statements in this certification, he or she shall attach an explanation to this application.

3. DRUG-FREE WORKPLACE (GRANTEES OTHER THAN INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610 –

A. The applicant certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an on-going drug-free awareness program to inform employees about–

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will–

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency, in writing, within 10 calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office

Building No. 3), Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted--

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

_____

_____

_____

Check ☐ if there are workplaces on file that are not identified here.

DRUG-FREE WORKPLACE (GRANTEES WHO ARE INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610 --

A. As a condition of the grant, I certify that I will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant; and

B. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, I will report the conviction, in writing, within 10 calendar days of the conviction, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant.

As the duly authorized representative of the applicant, I hereby certify that the applicant will comply with the above certifications.

NAME OF APPLICANT	PR/AWARD NUMBER AND/OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE

ED 80-0013, 6/90 (Replaces ED 80-0008, 12/89; ED Form GCS-008, (REV. 12/88); ED 80-0010, 5/90; and ED 80-0011, 5/90, which are obsolete)

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transactions

This certification is required by the Department of Education regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, for all lower tier transactions meeting the threshold and tier requirements stated at Section 85.110.

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

NAME OF APPLICANT	PR/AWARD NUMBER AND/OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE

ED 80-0014, 9/90 (Replaces GCS-009 (REV. 12/88), which is obsolete)

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:	2. Status of Federal Action:	3. Report Type:
☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	☐ a. bid/offer/application b. initial award c. post-award	☐ a. initial filing b. material change For Material Change Only: year _____ quarter _____ date of last report _____

4. Name and Address of Reporting Entity:	5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:
☐ Prime ☐ Subawardee Tier _____, *if known*: Congressional District, *if known*:	Congressional District, *if known*:
6. Federal Department/Agency:	7. Federal Program Name/Description: CFDA Number, *if applicable*: _____
8. Federal Action Number, *if known*:	9. Award Amount, *if known*: $
10. a. Name and Address of Lobbying Entity *(if individual, last name, first name, MI)*:	b. Individuals Performing Services *(including address if different from No. 10a)* *(last name, first name, MI)*:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply)*:	13. Type of Payment *(check all that apply)*:
$ _____ ☐ actual ☐ planned	☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____
12. Form of Payment *(check all that apply)*: ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____	

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____
Print Name: _____
Title: _____
Telephone No.: _____ Date: _____

Federal Use Only:

Authorized for Local Reproduction
Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).

11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.

12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.

13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.

14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.

15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.

16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ Page _____ of _____

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Standard Form - LLL-A

[FR Doc. 91-18938 Filed 8-9-91; 8:45 am]
BILLING CODE 4000-01-C

federal register

Monday
August 12, 1991

Part V

Department of Transportation

Research and Special Programs Administration

National Solid Wastes Management Association; Application for Preemption Determination; Notice

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. PDA-1]

National Solid Wastes Management Association; Application for Preemption Determination Concerning Regulations of the States of Maryland and Massachusetts and a Statute of the State of Pennsylvania

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Public notice and invitation to comment.

SUMMARY: The National Solid Wastes Management Association has applied for an administrative determination whether Maryland, Massachusetts and Pennsylvania requirements for bonds for hazardous-waste-carrying vehicles are preempted by the Hazardous Materials Transportation Act (HMTA).

DATES: Comments received on or before October 1, 1991, and rebuttal comments received on or before November 15, 1991, will be considered before an administrative ruling is issued by the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and any comments received may be reviewed in the Dockets Unit, Research and Special Programs Administration, room 8421, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590-0001. Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number (PDA-1). Three copies are requested. A copy of each comment and rebuttal comment must also be sent to John H. Turner, Esq., Association Counsel, National Solid Wastes Management Association, 1730 Rhode Island Avenue NW., suite 1000, Washington, DC 20036; Mr. James P. Snyder, Director, Bureau of Waste Management, Department of Environmental Resources, Commonwealth of Pennsylvania, P.O. Box 2093, Fulton Building, Harrisburg, PA 17120; Mr. Richard Collins, Director, Hazardous & Solid Waste Management Administration, State of Maryland, 2500 Broening Highway, Baltimore, MD 21224; and Mr. William F. Cass, Director, Division of Hazardous Waste, Department of Environmental Quality Engineering, Commonwealth of Massachusetts, One Winter Street, 5th Floor, Boston, MA 02108. A certification that a copy has been sent to each person must also be included with the comment. (The following format is suggested: "I certify that copies of this comment have been sent to Messrs. Turner, Snyder, Collins and Cass at the addresses specified in the Federal Register.")

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Assistant Chief Counsel for Hazardous Materials Safety, Office of the Chief Counsel, Research and Special Programs Administration, 400 Seventh Street SW., Washington, DC 20590-0001, telephone number 202-366-4400.

SUPPLEMENTARY INFORMATION:

1. Background

The preemption provisions of the Hazardous Materials Transportation Act (HMTA), 49 App. U.S.C. 1801 *et seq.*, were modified by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Public Law 101-615. The Research and Special Programs Administration's (RSPA's) regulations have been revised to reflect these changes. 56 FR 8616 (Feb. 28, 1991); 56 FR 15510 (Apr. 17, 1991).

Section 105(a)(4) of the HMTA (49 U.S.C. 1811(a)(4)) preempts "any law, regulation, order, ruling, provision, or other requirement of a State or political subdivision thereof or an Indian tribe" which concerns a "covered subject" and "is not substantively the same" as any provision of the HMTA or any regulation under that provision concerning that subject. The "covered subjects" are defined in section 105(a)(4) as:

> (i) The designation, description, and classification of hazardous materials.
>
> (ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials.
>
> (iii) The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents.
>
> (iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.
>
> (v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.

RSPA has issued a notice of proposed rulemaking proposing a specific definition for the term "substantively the same." 56 FR 36992 (Aug. 1, 1991). (However, no "covered subject" is at issue in this matter.)

In addition, section 105(b)(4) of the HMTA, 49 App. U.S.C. 1804(b)(4), addresses the preemption standards for hazardous materials highway routing requirements. No routing issues are involved in this matter, and the Secretary of Transportation has delegated responsibility for those highway routing issues, including the issuance of preemption determinations on highway routing issues to the Federal Highway Administration. 56 FR 31343 (July 10, 1991).

Finally, section 112(a) of the HMTA, 49 App. U.S.C. 1811(a), provides that State, political subdivision and Indian tribe requirements not covered by those section 105 (a) or (b) provisions are preempted if—(1) Compliance with both the State or political subdivision or Indian Tribe requirement and any requirement of [the HMTA] or of a regulation issued under [the HMTA] is not possible, [or] (2) The State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of [the HMTA] or the regulations issued under [the HMTA] * * *.

As indicated in the preamble to the final regulation implementing the HMTUSA preemption provisions, 56 FR at 8617 (Feb. 28, 1991), Congress, in section 112, codified the "dual compliance" and "obstacle" standards which RSPA previously had adopted by regulation and used in issuing its advisory inconsistency rulings.

All of the above-described preemption standards are in RSPA's regulations at 49 CFR 107.202.

Congress also provided for issuance of binding preemption determinations to replace the advisory inconsistency ruling process previously utilized by RSPA. Any person directly affected by such a requirement may apply for a determination whether a State, political subdivision or Indian tribe requirement is preempted by the HMTA. Notice of the application must be published in the Federal Register, and then the applicant is precluded from seeking judicial relief on that issue for 180 days after the application or until the preemption determination is issued, whichever occurs first. A party to a preemption determination proceeding may seek judicial review of the determination in U.S. district court within 60 days after the determination becomes final. Section 112(c) of the HMTA, 49 App. U.S.C. 1811(c).

The Secretary of Transportation has delegated authority to issue preemption determinations, except for those concerning highway routing issues, to

RSPA. 49 CFR 1.53; 56 FR 31343 (July 10, 1991). RSPA's Associate Administrator for Hazardous Materials Safety will issue those determinations. RSPA's regulations concerning preemption determinations were issued on February 28, 1991 (56 FR 8616), and are at 49 CFR 107.203–211 and 107.227.

Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under statutes other than the HMTA.

In issuing its preemption determinations under the HMTA, RSPA is guided by the principles enunciated in Executive Order No. 12612 entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of state laws only when the statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains several express preemption provisions, which RSPA has implemented through regulations.

2. The Application for a Preemption Determination

On July 17, 1991, the National Solid Wastes Management Association submitted the application for a preemption determination which is reproduced as appendix A to this notice.

(Copies of the three States' bond requirements were enclosed with the application and are available at no cost from the Dockets Unit, Research and Special Programs Administration, room 8421, Nassif Building, 400 Seventh Street SW. 20590–0001, telephone 202–366–4453)

3. Public Comment

Comments should be limited to the issue of whether the cited Maryland, Massachusetts and Pennsylvania bonding requirements are preempted by the HMTA. Comments should specifically address the "dual compliance" and "obstacle" tests described in the "Background" section. Because no "covered subject" is at issue in this matter, the "substantively the same" standard is not relevant.

Persons intending to comment on the application should review the standards and procedures governing the Department's consideration of applications for preemption determinations found at 49 CFR 107.201–107.211.

Issued in Washington, DC on August 6, 1991.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

Appendix A—Petition of National Solid Wastes Management Association to Initiate a Proceeding to Determine that Maryland, Massachusetts and Pennsylvania Provisions Requiring Bonds for Hazardous Waste-Carrying Vehicles Are Preempted by the Hazardous Materials Transportation Act (as amended)

I. Introduction and Authority for a Determination of Preemption

The National Solid Wastes Management Association ("NSWMA"), on behalf of its Chemical Waste Transportation Institute ("CWTI"), hereby petitions the Department of Transportation ("DOT") to institute an administrative proceeding leading to a binding inconsistency ruling invalidating hazardous waste transportation bonding requirements imposed by Maryland, Massachusetts and Pennsylvania. Petitioner calls on the Department to determine that the bond requirements are inconsistent with, and hence preempted, by the Hazardous Materials Transportation Act ("HMTA"), as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA"), and the Hazardous Materials Regulations ("HMR") promulgated by DOT.

The Department has previously held that non-Federal bonding requirements are flatly inconsistent with and preempted by the HMTA. In Inconsistency Ruling No. IR–25, 54 FR 16,308 (April 21, 1989), a local ordinance requiring the posting of a $1,000.00 bond for the highway transportation of hazardous waste was deemed inconsistent with the Act. DOT advanced the following rationale for its premise that non-Federal financial responsibility requirements imposed upon carriers of hazardous waste present a substantial risk of interference with the uniform system of regulation envisioned by Congress:

[I]f any one State may use [such measures] to deflect interstate carriers of hazardous materials into other jurisdictions, than all States may do so. The logical result would be, if not a total cessation of a Congressionally recognized form of interstate transportation, than the very pagework of varying and conflicting state and local regulations which Congress sought to preclude.

Id. at 16,310 (citing Inconsistency Ruling No. 10, 49 FR 46,656, 46,657).

DOT also noted that non-Federal bonding, insurance and indemnity requirements for hazardous materials transportation in all instances fail the "obstacle" preemption test and are, accordingly, inconsistent with the HMTA and the HMR:

If OHMT later determines that a bonding, insurance, or indemnity requirement is necessary under the HMTA for the transportation of non-radioactive hazardous materials, it will amend the HMR accordingly. Until such time, the absence of such a requirement of the HMR is a reflection of the OHMT's determination that no such requirement is necessary and that any such requirement imposed at the state or local level is inconsistent with the HMR.

The subject of bonding, insurance and indemnity requirements for hazardous materials transportation is exclusively Federal. The existence in the U.S. of more than 30,000 local jurisdictions, each having the potential to impose such requirements, demonstrates the havoc which could be created if even a small percentage of them were to impose such requirements (with their inevitable differences). It would be extremely difficult for carriers to learn about, let alone comply with, such local requirements.

Id. at 16,311.

Despite the clear, unambiguous finding of the DOT, three jurisdictions—Maryland, Massachusetts and Pennsylvania—continue to impose inconsistent, parochial bonding requirements upon motor carriers of hazardous waste. Such measures have been flatly rejected, by the DOT and the Congress, and cannot be permitted to stand.

II. The Need and Justification for a Finding of Inconsistency

A. Interest of Petitioner

Petitioner, NSWMA, is a non-profit trade association made up of approximately 2,500 private firms whose primary concern is the collection, transport, management and disposal of hazardous, solid and infectious waste and refuse. NSWMA members own and operate hazardous waste treatment, storage and disposal facilities and solid waste landfills throughout the United States. The Association's Chemical Waste Transportation Institute ("CWTI") consists of members who transport in interstate commerce hazardous waste from generators to disposal sites, either by truck or rail. These firms provide a vital service by handling and transporting this waste in an environmentally protective manner. A number of the Institute's members operate in Maryland, Massachusetts and Pennsylvania.

B. The Maryland, Massachusetts and Pennsylvania Bonding Requirements are Flatly Contrary to the Mandate of the HMTA

In contravention of the prior inconsistency rulings of this Department and the terms of the HMTA, as amended, Maryland, Massachusetts and Pennsylvania have imposed bonding requirements applicable only to motor carriers of hazardous waste. The state provisions, moreover, cannot be reconciled with and are not reciprocally recognized by each other. If these bonding requirements are permitted to stand, members of NSWMA which operate motor vehicles in interstate commerce will be faced with the need to comply with financial responsibility mandates in Maryland, Massachusetts and Pennsylvania that differ from the comprehensive federal program. It was this reason—the possibility that the states might enforce conflicting requirements—that prompted Congress to enact the HMTA and led to the imposition of more stringent preemption requirements in the HMTUSA. See, e.g., H.R. Rep. No. 444, Pt. 1, 101st Cong., 2d Sess. 34 (1990) ("Conflicting Federal, State and local requirements pose potentially serious threats to the safe

transportation of hazardous materials."). Moreover, unless these non-Federal bonding requirements are invalidated, other states may be encouraged to adopt disparate bonding, insurance and indemnification mandates. The mere *possibility* that numerous requirements could be imposed by states mandates a finding of preemption. See, e.g., Inconsistency Ruling 15, 49 FR 46,660 (1984); Inconsistency Ruling 14, 49 FR 46,656 (1984); Inconsistency Ruling 5, 47 FR 51,991 (1982).

(1) The Maryland Requirement

Maryland requires motor carriers of hazardous waste to secure "a bond of not less than $50,000" as a condition of securing a permit. Md. Regs. Code tit., 26, subtit. 13, § 4.04 (copy attached). The bond must be executed by the permittee and a corporate surety licensed to do business within the state. In lieu of a corporate surety, the permittee may deposit cash or negotiable bonds of the U.S. government in an amount at least equal "to the required sum of the bond." Alternatively, a certificate of deposit may be utilized, if it is "equivalent to the required bond, issued by a bank within the State, and accompanied by [a] written agreement of the bank to pay on demand to the State upon a finding of forfeit by the Secretary."

(2) The Massachusetts Requirement

The Massachusetts regulations provide that "no new or revised license to transport hazardous wastes shall be issued by the Department until the applicant for such license has filed a bond payable to the Department on a form provided by the Department, and such bond has been approved by the Department." Mass. Regs. Code tit. 310, § 30:411 (copy attached). The amount of the bond must be "$10,000 at a minimum" and "in an amount sufficient to assure that the licensee shall faithfully perform all of the requirements of [Massachusetts hazardous materials transportation regulations], the terms and conditions of the license and any Department order issued to the licensee." The "bond" may consist of a surety or performance bond, a "collateral indemnity agreement in a certain sum payable to the Department in cash or in negotiable bonds of the United States of America, the Commonwealth of Massachusetts or any city, town or body politic of the Commonwealth", or "irrevocable letter of credit of any bank organized or authorized to transact business in the Commonwealth or in the United States of America", or "any other collateral deemed satisfactory to the Department, provided that all such collateral shall be deposited in an escrow account in a bank authorized to transact in the Commonwealth, or may be held by the Department, and shall in all cases be in favor of the Department."

(3) The Pennsylvania Requirement

Pennsylvania law requires that a bond of "$10,000 at a minimum" (the Commonwealth typically requires bonds in amounts up to $50,000) be deposited "to ensure that the licensee faithfully performs the requirements of the act, the rules and regulations promulgated thereunder, the terms and conditions of the license and any Department order issued to the licensee." 25 Pa. Code § 263.32 (copy attached). The amount of the bond apparently depends upon the type of material and the volumes transported.

III. The State-Mandated Bonding Requirements Cannot Satisfy the "Obstacle" Test Set Forth in Section 112(a) of the HMTUSA

Congress revised section 112(a) of the HMTA by including the "obstacle" standard, previously used as a regulatory standard for determining preemption, as an explicit statutory ground for a binding finding of preemption. As the RSPA noted in its February 28, 1991 interpretive rule, 56 FR 8,616 (Feb. 28, 1991), the original HMTA "did not define 'inconsistent' or provide any standards for determining what requirements were 'inconsistent'." *Id.* at 8,617.

Accordingly, the Department previously set forth by regulation, see 49 CFR 107.209(c), two criteria for determining "whether a non-Federal requirement was inconsistent with the HMTA or the regulations * * *" *Id.* The "obstacle" criterion was, of course, "originally established by Supreme Court decisions determining whether a conflict exists between a State and Federal statute in areas where Congress has not completely foreclosed State regulation." *Id.*

In the HMTUSA, Congress merely "adopted" these standards proposed by the Department. The "two standards [adopted] are the same requirements that are current codified in regulations relating to inconsistency rulings." H.R. Rep. No. 441, Pt. 1, 101st Cong., 2d Sess. 49 (1990). Congress stated its intention to clarify the current preemption process "by more 'clearly identifying the standards against which a determination of preemption is made. Those standards are now reflected in court decisions and they are documented in the precedents established in the administrative rulings by the Department.' H.R. Rep. No. 444, Pt. 2, 101st Cong., 2d Sess. at 25 (1990)." *Id.*

As the Department has emphasized, while the scope of the "obstacle" test has not changed, Congress clearly provided for "an affirmative statement of preemption", *id.*, in cases in which the test is not met by state or local requirements. Accordingly, while all previous inconsistency rulings issued by the RSPA were merely advisory, the same tests must now be utilized, both by the RSPA and the courts, in making legally binding preemption determinations.

That the state bonding requirements at issue here constitute an obstacle to the accomplishment and execution of the federal legislation, in violation of section 112(a)(2) of the HMTUSA, is clear. The Department, as noted above, in a prior inconsistency ruling flatly rejected non-Federal bonding requirements. The Department's rationale for condemning the Maryland Heights, Missouri ordinance requiring bonds for hazardous waste-transporting vehicles is equally applicable here—federal regulations already require insurance or bonds for motor carriers transporting hazardous wastes, hazardous substances and other hazardous materials. See 54 FR at 16,311. By determining that "the subject is bonding" is "exclusively Federal", *id.*, the Department recognized that the *very existence* of local or state bonding schemes stands as an obstacle to the Congressional intent that a "multiplicity of state and local regulations and the potential for varying as well as conflicting regulations" be precluded. S. Rep. No. 1192, 93rd Cong., 2d Sess. 37–38 (1974).

In a variety of contexts, the DOT has warned that unless such state requirements are invalidated, other states surely will adopt similar provisions, resulting in multiplicity and hindering the accomplishment of the objectives of the HMTA. See, e.g., Inconsistency Ruling No. 15, 49 FR 46,660, 46,664 (possibility that other states can replicate Vermont user fee, resulting in multiplicity, necessitated finding of inconsistency); Inconsistency Ruling No. 14, 49 FR 46,656, 46,659 (1984); Inconsistency Ruling No. 10, 49 FR 46,665 (1984), correction, 50 FR 1,939 (1985); Inconsistency Ruling No. 8, 49 FR 46,637, 46,661 (1984); Inconsistency Ruling No. 6, 48 FR 760, 765 (1983). Maryland, Massachusetts and Pennsylvania are not, of course, precluded by federal law from assuming any role in the regulation of hazardous materials transport. Their role is, however, strictly confined to the narrow scope permitted by the preemption provisions of the HMTA and HMTUSA. Statewide bonding requirements, like ones imposed by municipalities or counties, exceed the scope of proper non-Federal authority and frustrate the fundamental goals of Congress.

Finally, NSWMA notes that a finding of preemption is totally consistent, not only with the provisions of the HMTA/HMTUSA, but also with basic principles of American federalism. On several occasions, the Supreme Court has found excessive state-imposed transportation requirements given the need for federal uniformity and in light of the potential for multiplicity. In *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), for example, the Court held invalid a Illinois mudguard requirement for trucks that used the state's highways. Although a unanimous Court recognized the state's authority to regulate the use of its highways was "broad and pervasive", *id.* at 523, it nevertheless held that the impact of the measure upon commerce—especially on "interlining"—was significant and that the safety benefit to the state was "too inconclusive", given the demonstrated burden on commerce. Similarly, in *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981), the Court rejected a state's argument that a restriction prohibiting certain vehicles from engaging in interstate transport made the state's routes safer. In *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 639 (1973), the Court likewise struck down a local ordinance restricting the use of a private airport on the ground that similar restrictions throughout the nation would cripple transportation. Congress has gone further, by setting forth in the HMTA (as amended) specific federal requirements for the demonstration by hazardous materials transporters of financial responsibility. Intervention by the Department is now essential in order to preserve and protect the uniform regulatory system which is essential

to the safe and efficient transportation of hazardous materials.

IV. Conclusion

For the reasons stated above, NSWMA requests that the Department of Transportation expeditiously grant the relief requested in this Petition. A copy of this Petition has been forwarded to the following by U.S. mail, first-class, return receipt requested:

James P. Snyder, Director, Bureau of Waste Management, Department of Environmental Resources, P.O. Box 2093, Fulton Building, Harrisburg, PA 17120.

Richard Collins, Director, Hazardous & Solid Waste Management Administration, 2500 Broening Highway, Baltimore, MD 21224.

William F. Cass, Director, Division of Hazardous Waste, Department of Environmental Quality Engineering, One Winter Street, 5th Floor, Boston, MA 02108.

Respectively submitted,

John H. Turner,

Association Counsel, National Solid Wastes Management Association (NSWMA), 1730 Rhode Island Ave., NW., suite 1000, Washington, DC 20036, (202) 659–4613.

[FR Doc. 91–19063 Filed 8–9–91; 8:45 am]

BILLING CODE 4910–60–M

federal register

Monday
August 12, 1991

Part VI

Department of Education

National Institute on Disability and Rehabilitation Research; State Grants Program for Technology-Related Assistance; Notice

DEPARTMENT OF EDUCATION

National Institute on Disability and Rehabilitation Research; State Grants Program for Technology-Related Assistance

AGENCY: Department of Education.

Notice Inviting Applications for New Awards Under the State Grants Program for Technology-Related Assistance for Individuals With Disabilities for Fiscal Year 1992

Purpose of Program: This program provides financial assistance to States to assist them in developing and implementing a consumer-responsive, comprehensive statewide program of technology-related assistance for individuals with disabilities.

Deadline For Transmittal of Applications: October 15, 1991.

Applications Available: August 22, 1991.

Eligible Applicants: State entities designated by the Governor as the lead agency.

Available Funds: $5,000,000.

Estimated Average Size of Awards: $500,000.

Estimated Number of Awards: 10.

Project Period: Up to 36 months, with the possibility of a 24 month extension.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR), in 34 CFR parts 74, 75 (except § 75.618), 77, 79, 80, 81, 82, 85, 86; and (b) the regulations for this program is 34 CFR part 345.

For Applications Contact: National Institute on Disability and Rehabilitation Research, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–2601. Attention: Peer Review Unit. Telephone: (202) 732–1141; Deaf or hearing-impaired individuals may call (202) 732–5373 for TDD services.

FOR FURTHER INFORMATION CONTACT: Carol Cohen, National Institute on Disability and Rehabilitation Research, Telephone: (202) 732–5066.

Program Authority: 29 U.S.C. 2201–2271.

Dated: August 7, 1991.

Robert R. Davila,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 91–19076 Filed 8–9–91; 8:45 am]

BILLING CODE 4000–01–M

federal register

Monday
August 12, 1991

Part VII

Department of the Treasury

Office of Thrift Supervision

12 CFR Parts 508, 509, 512 and 513
Rules of Practice and Procedure in Adjudicatory Proceedings; Rule

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 508, 509, 512 and 513

[No. 91-464]

RIN 1550-AA35

Rules of Practice and Procedure in Adjudicatory Proceedings

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (the OTS), pursuant to and in accordance with section 916 of the Financial Institution Reform, Recovery and Enforcement Act of 1989, Public Law No. 101-73, 103 Stat. 183, 486 (Section 916) is amending its regulations pertaining to the conduct of administrative hearings. Section 916 requires the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board of Governors), the Federal Deposit Insurance Corporation (FDIC), OTS, and the National Credit Union Administration (NCUA) (collectively referred to herein as the Agencies) to develop a set of uniform rules and procedures for administrative proceedings (Uniform Rules). Section 916 further requires that the Agencies promulgate provisions for summary judgment rulings where no dispute as to the material facts of a case exist.

In compliance with the mandate of Section 916, this final rule promulgates a uniform set of rules for formal enforcement actions common to at least four of the listed agencies. In addition, this final rule promulgates additional regulations to supplement the Uniform Rules (the Local Rules) and makes certain other conforming amendments.

EFFECTIVE DATE: August 12, 1991.

FOR FURTHER INFORMATION CONTACT: C. Dawn Causey, Attorney, Enforcement, (202) 906-7157; Carolyn B. Lieberman, Senior Deputy Chief Counsel, (202) 906-6251; Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

A. General Discussion

Section 916 requires that the Agencies develop a set of uniform rules and procedures for administrative hearings. By including this provision in the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA), Congress intended that the Agencies, by promulgating uniform procedures, would improve and expedite their administrative proceedings. The statutory provision is a reflection of "recent recommendations of the Administrative Conference of the United States and the House Government Operations Committee." H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 396. The Administrative Conference of the United States found in its December 30, 1987, recommendation that "(g)iven the similar statutory bases for these enforcement actions, the five agencies jointly should be able to develop substantially similar rules of procedure and practice for formal enforcement proceedings." 1 CFR 305.87-12.

To comply with the requirements of section 916, the Agencies issued for comment a Joint Notice of Proposed Rulemaking on June 17, 1991 (56 FR 27790). The proposed rule contained one set of Uniform Rules applicable to all the Agencies and separate Local Rules applicable to each agency.

The OTS has received comments on the joint proposed rule and its own Local Rules and is now issuing a final rule. This final rule is intended to standardize procedures for formal administrative actions and to facilitate administrative practice before the Agencies.

Subpart A of OTS's final rule, the "Uniform Rules," sets forth the rules of practice and procedure for those formal enforcement actions that are required by statute to be determined on the record after an opportunity for an administrative hearing and generally replace the procedures governing formal adjudications in 12 CFR part 509, subpart A. Each agency is adopting substantially similar Uniform Rules. The Local Rules in subpart B generally replace the procedures for civil money penalties found in 12 CFR part 509, subpart B, and add further provisions. Civil money penalties and other OTS-specific proceedings are subject to the provisions in both subparts.

The OTS Local Rules address civil money penalties, deposition discovery and additional procedures for the post-hearing process.

B. Summary and Discussion of Uniform and Local Rules

Subpart A. Uniform Rules of Practice and Procedure

This subpart sets forth rules of practice and procedure governing formal administrative actions, includes rules on the commencement of enforcement proceedings, filing and service of papers, motions, discovery, depositions, prehearing conferences, public hearings, hearing subpoenas, conflicts of interest, ex parte communications, rules of evidence, and post-hearing procedures.

Subpart B. Local Rules

There are four basic parts to the OTS Local Rules: An expansion of the scope provisions to include additional OTS proceedings, deposition discovery, civil money penalties and additional clarifying procedures. The appointment of the Office of Financial Institution Adjudication to hear OTS's APA proceedings implements the other statutory directive contained in section 916.

In particular, included in this subpart are the rules for taking the deposition of an expert or of another person, including another party, who has direct knowledge of matters that are non-privileged, relevant and material to the proceeding and where there is a need for the deposition. OTS is adding a demonstration of need in order to make the OTS rule consistent with the rule promulgated by the Office of the Comptroller of the Currency. This uniformity will encourage consistent interpretation of the rules governing deposition discovery.

This provision is not intended to allow unlimited deposition discovery or the taking of senior OTS official's depositions, unless those individuals have personal knowledge about the facts of the case. Rather, it is intended to permit limited deposition discovery of experts and persons having direct knowledge of the facts who may be called on to testify at the administrative hearing.

This subpart also provides that at the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a deposition. The party requesting the subpoena is responsible for serving it on the person named therein, or on that person's counsel. The person named in the subpoena or any other party to the proceeding may file a motion to quash or modify the subpoena within the time for compliance set forth in the subpoena, but in no case later than ten days after the date of service.

Also included in the OTS Local Rules is a provision on the presence of cameras and other recording devices in administrative proceedings. As proposed, the provision would have allowed the Director to consider petitions to allow electronic media to be present during administrative hearings. Upon further consideration, OTS has determined that it is inappropriate to allow cameras and other recording devices (other than those used by the court reporter) to be used during

administrative hearings and the provision has been modified accordingly. See, 1 CFR 305.72–1 (1991). This provision codifies recent OTS procedures in several administrative proceedings. See, OTS Order No. 90–1714, dated September 18, 1990, concerning the use of cameras in the Neil M. Bush administrative hearing. However, § 509.4 would allow the Director to waive this prohibition if the Director determined that circumstances presently unforeseen so warrant.

C. Response to Comments

1. Uniform Rules

In response to the June 17, 1991, joint notice of proposed rulemaking, the Agencies received three comments: 2 from law firms and 1 from a trade association. The Agencies have jointly reviewed the portions of the comments concerning the Uniform Rules.

One of the commenters criticized the proposed rule for failing to accommodate default situations where good cause could be shown for the failure to file an answer (§ 509.19(c)(1)). This comment reflects a misunderstanding of the proposal. The rulemaking empowers the administrative law judge to extend time limits for good cause (§ 509.13), and requires that default judgments be entered only upon a motion for default filed by Enforcement Counsel (§ 509.19). This latter proceeding provides respondents with an opportunity to oppose the motion. Because of the confusion evidenced by the comment, the final rule has been amended to make the motion for default process more explicit.

Another issue raised by a commenter concerned the differences in procedures for formal investigations, Equal Access to Justice Act implementation, sanctions and a number of other procedures. The lack of uniformity in these areas is based on the scope of section 916. As noted above, the purpose behind Section 916 was the improvement and expedition of administrative APA proceedings. *Cf.* H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 442 (1989). The statutory mandate for the promulgation of these regulations is coupled with the requirement for the several Agencies to create a "pool" of administrative law judges. The clear Congressional intent is that these Uniform Rules be developed for use by the Agencies in actions before the "pool" or "OFIA" as that entity is referred to in this rulemaking. Accordingly, the inclusion of non-APA proceedings would exceed the statutory mandate of Section 916 and presents practical implementation problems as well.

For example, the Uniform Rules do not contain provisions governing formal investigations. This is because such an investigation is not an APA proceeding. In addition, the statutory authority for formal investigations arises in several statutes, not just the Federal Deposit Insurance Act, and the Agencies have differing policies concerning the frequency, length and procedures for formal investigations. This diversity in statutory authority is reflected in the independent and separate procedures of each agency. OTS's rules governing formal investigations, for example, are found in an entirely different part of its regulations, 12 CFR part 512, and were not republished as part of the promulgation of this rulemaking.

Likewise, the Uniform Rules do not contain provisions addressing the Equal Access to Justice Act. Again, the diversity of agency structure is a determining factor here. Both the OCC and the OTS are bureaus of the U.S. Department of Treasury. As such, they are subject to Treasury's Equal Access to Justice Act regulatory provisions found at 31 CFR part 6.

Another issue raised by two of the commenters concerned the different positions taken by the Agencies on discovery depositions. The commenters noted that the use of discovery depositions would encourage settlements and would result in the increased use of summary judgment by establishing the absence of disagreement as to material facts.

The scope of discovery in the Uniform Rules was considered at length. It was determined that broad document discovery would be permitted generally; however, it was recognized that there is no constitutional right to prehearing discovery, including deposition discovery. See, *Sims* v. *Nat'l Transp. Safety Bd.*, 662 F.2d 668, 671 (10th Cir. 1981); *P.S.C. Resources, Inc.* v. *NLRB*, 576 F.2d 380, 386 (1st Cir. 1978); *Silverman* v. *Commodity Futures Trading Comm'n*, 549 F2d 28, 33 (7th Cir. 1977). Further, the Administrative Procedure Act contains no provisions for prehearing discovery, and the discovery provisions of the Federal Rules of Civil Procedure are inapplicable to administrative proceedings. *Frillette* v. *Kimberlin*, 508 F.2d 205 (3rd Cir. 1974), *cert. denied*, 421 U.S. 980 (1975). Rather, each agency determines the extent and nature of discovery to which a party in an administrative hearing is entitled. *McClelland* v. *Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979).

The Agencies attempted to strike a balance between the interests of respondents in obtaining pretrial disclosure, including discovery depositions, and the Agencies' need for swift adjudication while preserving limited resources. This process included taking into account the various interests and concerns of both the industry and the general public that each Agency serves, as well as each Agency's own institutional interests and concerns. The contrasting interests and concerns are reflected in the types, complexity and quantity of enforcement actions brought by each agency; the methods of litigation; the structure of each regulator; and the supervisory procedures developed internally by each agency. This process resulted in divergent provisions on the use of discovery depositions.

Thus, the experiences of the OCC, the Board of Governors and the OTS resulted in a finding that limited discovery depositions served a useful purpose by promoting fact finding and in resolving cases expeditiously. However, discovery depositions for the OCC, the Board of Governors and the OTS are limited to witnesses that have factual, direct personal knowledge of the matters at issue. The FDIC and the NCUA have determined that the interests of respondents in further pretrial disclosures in their respective proceedings were mitigated by the availability of extensive document discovery that complements the document intensive nature of their proceedings.

A further comment suggested that the definition of "Decisional employee" in proposed § 509.3(e) be expanded to preclude from service in a decisional capacity any employee of the Agencies who had served within the previous twelve months on the enforcement staff of any of the Agencies. The commenter suggested that this expansion would protect against bias and conflicting interests.

This suggestion is not adopted as the final rule incorporates the formulation of the Administrative Procedure Act (APA). The APA forbids an employee from acting in a decisional capacity in a specific case where the employee has acted in an investigative or prosecutorial function in that same case or in a factually related case. 5 U.S.C. 554(d). Accordingly, Congress has already drawn the line defining conflicts of interest in this context, and the Agencies find no basis for modification.

Another recommendation was made that § 509.18(b) should be modified to require that an agency set forth in a

notice not only facts showing that the agency is entitled to relief of some kind but also those facts required for the particular relief requested. The Agencies believe that § 509.18(b) meets those standards for notice pleading set forth in Rule 8 of the Federal Rules of Civil Procedure. The Agencies have determined that this standard for pleadings is sufficient for administrative proceedings. See, *First Nat'l Monetary Corp.* v. *Weinberger*, 819 F.2d 1334, 1339 (6th Cir. 1987); *Boise Cascade Corp.* v. *Fed. Trade Comm'n*, 498 F. Supp. 772, 780 (D. Del. 1980).

One commenter suggested that the proposed rule concerning the severance of proceedings be modified as it was unduly stringent in light of the severity of the sanctions and penalties that the Agencies may impose as part of an administrative enforcement action. The commenter argued that any inconsistency or conflict in the positions of respondents should warrant severance of the proceeding without the necessity of weighing any countervailing interests. The commenter further urged that concerns regarding administrative economy are not entitled to weight in light of the small number of cases that have been adjudicated by the Agencies historically.

This amendment is not adopted in the final rule. A similar weighing test for severance is applied by federal courts in criminal cases. See, *e.g.*, *U.S.* v. *Walton*, 552 F.2d 1354, 1362, (10th Cir.), *cert. denied*, 431 U.S. 959 (1977) (demonstrating that the weighing test appropriately may be applied in cases involving substantial sanctions and penalties). In addition, the general interest in economy and efficiency in resolving an administrative adjudication exists independently of the total volume of adjudications at any particular time. Hence, the historical volume has little impact on the calculation of adjudicatory economy and efficiency.

Another commenter urged modification of § 509.24(c) concerning the nondiscoverability of privileged documents. This commenter objected to the ability of Enforcement Counsel to assert the deliberative process privilege on the ground that, in some cases, it is subject to abuse by Enforcement Counsel seeking to prevent disclosure of relevant and probative material. The commenter suggests, instead, that all material for which the deliberative process privilege is claimed should be produced pursuant to a protective order barring public disclosure, and that § 509.24 should provide for *in camera* inspection of disputed privileged material by the administrative law judge.

The Agencies have concluded that Enforcement Counsel should retain the right to assert the deliberative process privilege at the outset. Ample means to challenge an improper assertion of privilege are available to respondents without modifying § 509.24 to permit a challenge to the assertion of the privilege before the administrative law judge. Confronted with such a challenge, an administrative law judge would need no further specific authority by rule to inquire of Enforcement Counsel as to the basis of the assertion of privilege, to conduct an inspection of the purported privileged material *in camera*, and then to rule whether the privilege can be maintained.

Another of the comments suggested that the determination to seal a document pursuant to § 509.33(b) should be subject to review by an administrative law judge under an abuse of discretion standard. It was further suggested that a respondent should be able to request that certain information such as confidential personal information be filed under seal.

The Uniform Rules accommodate this last concern by permitting a respondent to file a motion to seal a document containing confidential personal information. However, the statutory language of 12 U.S.C. 1818(u)(6) vests the Agencies with exclusive authority to seal all or part of a document if disclosure would be contrary to the public interest. Accordingly, the Agencies disagree with the commenter that this determination should be subject to review by an administrative law judge.

A further comment urged the deletion of § 509.36(c)(2), which provides that any document prepared by a Federal financial institutions regulatory agency or by a state regulatory agency is admissible with or without a sponsoring witness. The commenter argued that the provision violates normal evidentiary standards and raises due process concerns.

The Agencies disagree. The first sentence of § 509.36(c)(2) cross-references § 509.36(a), which makes agency prepared documents subject to the same evidentiary standards as those applicable to non-agency prepared documents. Moreover, the same types of agency prepared documents tend to be introduced into evidence in every case. These documents, such as examination reports, rarely give rise to authentication issues, and the Agencies are of the opinion that requiring a sponsoring witness for such documents needlessly consumes judicial resources and impedes the hearing process.

Yet another comment urged that § 509.39(b)(2) be modified to allow a party to raise new legal arguments in exceptions filed to the administrative law judge's recommended decision and that the Agency Head not be precluded from considering such an argument.

The Agencies agree. The Director, as the Agency Head of OTS, should have the discretion to determine whether a new argument that is raised for the first time in the exceptions should be considered, even if the party had a prior opportunity to make the argument. For example, the Director should have the discretion to consider whether a new argument has important legal and policy implications that warrant further consideration. Accordingly, the language of § 509.39(b)(2) is amended to read that "No exception *need* be considered * * *." (emphasis added).

The Agencies do not agree that the Agency Head should, in effect, be required to consider new arguments raised for the first time in the exceptions. Such a provision may encourage careless or even deceptive pleading. Generally, a party should be permitted to submit a new argument only if there was no previous opportunity to present the argument, *e.g.*, a relevant court decision has been issued in the interim since the filing of the recommended decision.

Another suggestion forwarded by a commenter concerned the publication of enforcement orders and actions. Indeed, Congress has already addressed this concern when it amended 12 U.S.C. 1818(u) in title XXV, the "Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990" of the Crime Control Act of 1990, Public Law No. 101-647, 104 Stat. 4789. The Agencies are required by statute to publish all final orders and other documents subject to enforcement action. Each of the Agencies has procedures implementing this statutory directive and most, if not all, enforcement decisions may be found by consulting the Public Reading Rooms or libraries of each agency. In addition, Agencies frequently issues press releases concerning recent cases and decisions.

2. OTS Local Rules

One commenter urged deletion of § 509.103(a), expressing the view that its rationale was unclear in light of the characterization of civil money penalties as a "penal sanction" in *First National Bank of Gordon* v. *Dept. of the Treasury*, 911 F.2d 64 (8th Cir. 1990). It is evident

from the language of the civil money penalty provisions in FIRREA, as well as from the legislative history, that civil money penalties are intended both to remedy wrongful conduct and to deter such conduct in the future and, accordingly, do not constitute penal sanctions. In these circumstances, OTS does not believe it is necessary to provide a description of civil money penalties and subsection (a) of proposed § 509.103 has been deleted.

Similarly, OTS has deleted subsection (d) to proposed § 509.103 because it merely restates the statutory considerations of FIRREA. Both FIRREA and its legislative history are clear as to the various factors that OTS must consider when assessing civil money penalties. See, H. Rept. No. 54, 101st Cong. 1st Sess., pt. 1, at 469, reprinted in 1989 U.S. Code Cong. & Admin. News 265, citing with approval the 13 factors contained in the 1980 interagency policy issued by the Federal Financial Institution's Examination Council. The remaining subsections of § 509.103 have been redesignated as subparagraphs (a) and (b).

The commenter further noted that the assessment order for civil money penalties should contain sufficient grounds properly pleaded in the notice. OTS agrees with the commenter. However, the standard for a notice of assessment enumerated is sufficient as explained in the OTS's response to the comment on the sufficiency of notices in the Uniform Rules. For this reason, OTS is not implementing the commenter's suggestion.

This commenter also disagreed with proposed § 509.104(e) concerning extensions of time to render decisions by the Director. The commenter misreads the cited case, *Saratoga Savings & Loan Ass'n* v. *Fed. Home Loan Bank Board*, 879 F.2d 689 (9th Cir. 1989), and OTS is adopting as final the rule as proposed.

The commenter also suggested that OTS adopt rules for sanctions against parties who engage in improper conduct during agency proceedings. OTS directs the commener's attention to 12 CFR part 513. That part allows the OTS to suspend or debar, either temporarily or permanently, attorneys and others from practicing before the Office if the OTS makes a determination that the individual: (i) Lacks the necessary qualifications to represent others; (ii) is lacking in character or professional integrity; (iii) has engaged in dilatory, obstructionist, egregious, contemptuous, contumacious or other unethical or improper professional conduct; or (iv) has willfully violated or willfully aided or abetted the violation of any laws or regulations for which the OTS has jurisdiction. 12 CFR 513.4(a). A recommendation for such a suspension or debarment proceedings against obstructionist counsel may be made by the administrative law judge to OTS under § 509.6(b). As OTS is not making any substantive changes to the provisions of part 513, there was no need to republish those rules as part of this rulemaking.

D. Additional Modifications to the Rule

In conjunction with the other Agencies, the OTS is amending the Uniform Rules to replace generic definitional terms with terms specifically applicable to the OTS. Thus, the OTS is replacing the term "Agency Head" and "Agency" with "Director" and "Office" and is restricting the "scope" provision to those statutes applicable to OTS. Further conforming changes have been made to the definitions of Local Rules, Uniform Rules and OFIA. Each of the other Agencies has made similar changes.

The purpose of these changes is to make the Uniform Rules easier to understand and use. These changes do not affect the substance of the Uniform Rules.

In addition to the changes already noted, the OTS is also making various other minor technical and conforming changes to the Uniform and Local Rules to improve the clarity and consistency of the rules, including the correction of additional out-of-date cross references.

E. Administrative Procedure Act

The Director is adopting this regulation effective upon publication in the Federal Register, without the usual 30-day delay of effectiveness provided for in 5 U.S.C. 553 of the APA. While the APA requires publication of a substantive regulation not less than thirty days before its effective date, the delayed effective date requirement may be waived for "good cause."

Good cause for the waiver of the 30-day requirement may be found if the delayed effective date is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b). *See Central Lincoln Peoples' Utility Distr.* v. *Johnson*, 735 F.2d 1101 (9th Cir. 1984). The necessity for compliance with a statutorily prescribed time limit can also contribute to a finding of good cause. *See Philadelphia Citizens in Action* v. *Schweiker*, 669 F.2d 877, 888 (3d Cir. 1982). In the present case, the implementation of a delayed effective date would impair the ability of the Agencies to comply with the statutory mandate in Section 916 and would be contrary to the public interest.

Section 916 contains a dual mandate from Congress to the Agencies to (1) establish their own pool of administrative law judges (OFIA), and (2) develop Uniform Rules and procedures for administrative hearings "[b]efore the close of the 24-month period beginning on the date of the enactment of this Act (August 9, 1989)." In order to address properly these two mandates, the Uniform Rules and the establishment of OFIA should be implemented in a coordinated and synchronized manner. If OFIA is established prior to the effective date of this rulemaking, OFIA would be required to adjudicate some cases under the prior, divergent rules of each Agency. As the proceedings filed with OFIA will be primarily new actions, use of the new Uniform Rules rather than the prior versions will reduce significantly the potential for confusion and more appropriately fulfill the mandate of section 916. It would, therefore, be contrary to the public interest to delay the effective date for implementation of this rulemaking.

F. Applicability of Rules to Enforcement Proceedings

Part 509, as revised by this final rule, applies to any proceeding that is commenced by the issuance of a notice on or after August 12, 1991. The former version of part 509 applies to any proceeding commenced prior to August 12, 1991 unless, with the consent of the administrative law judge, the parties agree to have the proceeding governed by revised part 509.

G. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, it is certified that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

H. Executive Order 12291

The OTS has determined that this rule does not constitute a "major rule" and, therefore, does not require the preparation of a regulatory impact analysis.

List of Subjects

12 CFR Part 508

Administrative practice and procedure, Crime, Savings associations.

12 CFR Part 509

Administrative practice and procedure, Penalties.

12 CFR Part 512

Administrative practice and procedure, Investigations.

12 CFR Part 513

Accountants, Administrative practice and procedure, Lawyers.

Accordingly, the OTS hereby amends parts 508, 509, 512, and 513, subchapter A, chapter V, title 12, Code of Federal Regulations, as set forth below:

SUBCHAPTER A—ORGANIZATION AND PROCEDURES

PART 508—[AMENDED]

1. The authority citation for part 508 continues to read as follows:

Authority: Sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); sec. 2, 64 Stat. 879, as amended (12 U.S.C. 1818).

2. Section 508.4(b) is amended by removing the number "§ 509.9" and substituting in lieu thereof the number "§ 509.11".

3. Section 508.6(c) is amended by removing the number "§ 509.5" and substituting in lieu thereof the number "§ 509.6".

4. Section 508.7(a) is amended by removing the number "§ 509.4" and substituting in lieu thereof the number "§ 509.5".

5. Section 508.13(b) is amended by removing "§ 509.27(b) and substituting in lieu thereof the number "§ 509.39".

6. Section 508.14 is amended by removing the phrase "§§ 509.9, 509.10, 509.11, 509.12, and" and substituting in lieu thereof the phrase "§§ 509.10, 509.11, and 509.12".

7. Part 509 is revised to read as follows:

PART 509—RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS

Subpart A—Uniform Rules of Practice and Procedure

Sec.

509.1 Scope.
509.2 Rules of construction.
509.3 Definitions.
509.4 Authority of Director.
509.5 Authority of the administrative law judge.
509.6 Appearance and practice in adjudicatory proceedings.
509.7 Good faith certification.
509.8 Conflicts of interest.
509.9 Ex parte communications.
509.10 Filing of papers.
509.11 Service of papers.
509.12 Construction of time limits.
509.13 Change of time limits.
509.14 Witness fees and expenses.
509.15 Opportunity for informal settlement.
509.16 Office's right to conduct examination.
509.17 Collateral attacks on adjudicatory proceeding.
509.18 Commencement of proceeding and contents of notice.
509.19 Answer.
509.20 Amended pleadings.
509.21 Failure to appear.
509.22 Consolidation and severance of actions.
509.23 Motions.
509.24 Scope of document discovery.
509.25 Request for document discovery from parties.
509.26 Document subpoenas to nonparties.
509.27 Deposition of witness unavailable for hearing.
509.28 Interlocutory review.
509.29 Summary disposition.
509.30 Partial summary disposition.
509.31 Scheduling and prehearing conferences.
509.32 Prehearing submissions.
509.33 Public hearings.
509.34 Hearing subpoenas.
509.35 Conduct of hearings.
509.36 Evidence.
509.37 Proposed findings and conclusions.
509.38 Recommended decision and filing of record.
509.39 Exceptions to recommended decision.
509.40 Review by Director.
509.41 Stays pending judicial review.

Subpart B—Local Rules

Sec.

509.100 Scope.
509.101 Appointment of Office of Financial Institution Adjudication.
509.102 Discovery.
509.103 Civil money penalties.
509.104 Additional procedures.

Authority: 5 U.S.C. 556; 12 U.S.C. 1464, 1467, 1467a, 1813; 15 U.S.C. 78*l*.

Subpart A—Uniform Rules of Practice and Procedure

§ 509.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the or the Office should issue an order to approve or disapprove a person's proposed acquisition of an institution and/or institution holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the Office is the appropriate Office;

(e) Assessment of civil money penalties by the Office against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate Office for any violation of:

(1) Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464 (d), (s) and (v);

(2) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d);

(3) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a (i) and (r);

(4) Any provisions of the Change in Bank Control Act, any regulation or order issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Sections 22(h) and 23 of the Federal Reserve Act, or any regulation issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1468;

(6) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(7) Section 1120 of Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder; and

(8) The terms of any final or temporary order issued or enforceable pursuant to section 8 of the FDIA or of any written agreement executed by the Office, the terms of any conditions imposed in writing by the Office in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(f) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Office's Local Rules.

§ 509.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 509.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the Office's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Office or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Director* means the Director of the Office of Thrift Supervision or his or her designee.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the Office in an adjudicatory proceeding.

(f) *Final order* means an order issued by the Office with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof whether wholly or partly owned (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467(a)).

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules found in subpart B of this part.

(j) *Office* means the Office of Thrift Supervision in the case of any savings association or any savings and loan holding company, and subsidiary (other than a bank or subsidiary of that bank) of a savings and loan holding company, any service corporation of a savings association, and any subsidiary of such service corporation, whether wholly or partly owned.

(k) *Office of Financial Institution Adjudication* (OFIA) means the executive body charged with overseeing the administration of administrative enforcement proceedings for the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the National Credit Union Administration and the Office.

(l) *Party* means the Office and any person named as a party in any notice.

(m) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (g) of this section.

(n) *Respondent* means any party other than the Office.

(o) *Uniform Rules* means those rules in subpart A of this part.

(p) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 509.4 Authority of Director.

The Director may, at any time during the pendency of a proceeding perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 509.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 509.31 of this subpart;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Director shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) to prepare and present to the Director a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 509.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before an Office or an administrative law judge.*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the Office if such attorney is not currently suspended or debarred from practice before the Office.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the Office.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Office, shall file a notice of appearance with the OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. Such notice of appearance shall include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel thereby agrees, and represents that he or she is authorized, to accept

service on behalf of the represented party.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 509.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 509.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or a party and an institution to which notice of the proceeding must be given, counsel must certify in writing at the time of filing the notice of appearance required by § 509.6(a) of this subpart:

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party or institution;

(2) That each such party or institution has advised its counsel that to its knowledge there is no existing or anticipated material conflict between its interests and the interests of others represented by the same counsel or his or her firm; and

(3) That each such party or institution waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 509.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material or oral or written communication concerning the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) A party, his or her counsel, or another person interested in the proceeding; and

(ii) The administrative law judge handling that proceeding, the Director or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Director until the date that the Director issues its final decision pursuant to § 509.40(c) of this subpart, no party, interested person or counsel therefor shall knowingly make or cause to be made an ex parte communication concerning the merits of the proceeding to the Director, the administrative law judge, or a decisional employee. The Director, administrative law judge, or decisional employee shall not knowingly make or cause to be made to a party, or any interested person or counsel therefor, an ex parte communication relevant to the merits of a proceeding.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, the Director or other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Director or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

§ 509.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 509.25 and 509.26 of this subpart, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Director or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Director or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section as to form.

(c) *Formal requirements as to papers filed.*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been

made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½ x 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 509.7 of this subpart.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the Office and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Director, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 509.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 509.10(c) of this subpart as to form.

(c) *By the Director or the administrative law judge.* (1) All papers required to be served by the Director or the administrative law judge upon a party who has appeared in the proceeding through a counsel of record, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 509.6 of this subpart, the Director or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) By delivery to a person of suitable age and discretion at the party's residence;

(iii) By registered or certified mail addressed to the party's last known address; or

(iv) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made by personal service, by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence, by registered or certified mail addressed to the person's last known address, or in such other manner as is reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 509.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event from which the designated period of time begins to run is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time, except that, when the time period within which an act is to be performed is ten days or less, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Director or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered or certified mail, add three days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one day to the prescribed period; or

(3) If service is made by electronic media transmission, add one day to the prescribed period, unless otherwise determined by the Director or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 509.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or any notice or order issued in the proceedings. After the referral of the case to the Director pursuant to § 509.38 of this subpart, the Director may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or on the Director's or the administrative law judge's own motion after notice and opportunity to respond is afforded all non-moving parties.

§ 509.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or deposition shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the Office is the party requesting the subpoena. The Office shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the Office.

§ 509.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any Office representative other than Enforcement

Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 509.16 Office's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the Office to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the Office to conduct or continue any form of investigation authorized by law.

§ 509.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 509.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the Director.

(ii) The notice must be served by the Director upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Director.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the Office's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the Office is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) The answer and/or request for a hearing shall be filed with OFIA.

§ 509.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, the administrative law judge, upon motion of the Enforcement Counsel, shall file with the Director a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Director based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 509.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding by leave of the administrative law judge. Such leave will be freely given. The respondent shall answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Director or administrative law judge orders otherwise for good cause shown.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may allow the notice or answer to be amended and will do so freely when the determination of the merits of the action is served thereby and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice the party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 509.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Director a recommended decision containing the findings and the relief sought in the notice.

§ 509.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any

party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 509.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, but upon the filing of the recommended decision, motions must be filed with the Director.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Director, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 509.29 and 509.30 of this subpart.

§ 509.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Parties to proceedings under this subpart may obtain document discovery through the production of documents, including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form.

(2) Discovery by use of deposition is governed by § 509.102 of this part.

(b) *Relevance.* Parties may obtain document discovery regarding any matter, not privileged, which has material relevance to the merits of the pending action. It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to discovery of admissible evidence. The request may not be unreasonable, oppressive, excessive in scope or unduly burdensome.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 509.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents which are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business and shall be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents the requesting party may specify that all or some of the responsive documents are to be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If more than 250 pages of copying is requested, the requesting party shall pay for copying, unless the parties agree otherwise, at the current per-page copying rate imposed by the Office's rules at 12 CFR part 505 implementing the Freedom of Information Act (5 U.S.C. 552a) plus the cost of shipping.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 509.23 of this subpart to revoke or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 509.23 of this subpart are waived.

(2) The party who served the request that is the subject of a motion to revoke or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, all documents withheld on the grounds of privilege must be reasonably identified, together with a statement of the basis for the assertion of privilege.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 509.23 of this subpart for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all

motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, is unreasonable, unduly burdensome, excessive in scope, repetitive of previous requests or seeks to obtain privileged documents, he or she may modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to revoke or limit discovery or to compel production shall not be a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 509.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 509.24(d) of this subpart. The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 509.25(d) of this subpart, and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 509.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the

objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with or procures a failure to comply with, a subpoena issued under this section.

§ 509.28 Interlocutory review.

(a) *General rule.* The Director may review a ruling of the administrative law judge prior to the certification of the record to the Director only in accordance with the procedures set forth in this section and § 509.23 of this subpart.

(b) *Scope of review.* The Director may exercise interlocutory review of a ruling of the administrative law judge if the Director finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 509.23 of this subpart. Any party may file a response to a request for interlocutory review in accordance with § 509.23(d) of this subpart. Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Director for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Director under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Director.

§ 509.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Director issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Biling of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Director. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 509.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 509.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the

request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which office notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at its expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 509.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 509.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Office, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Director a request for a private hearing, and any party may file a pleading in reply to such a request. Such requests and replies are governed by § 509.23 of this subpart. Failure to file a request or a reply is deemed a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 509.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena duces tecum requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at such hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia or as otherwise provided by law at any designated place where the hearing is being conducted.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. The party making the application shall serve a copy of the application and the proposed subpoena on every other party to the proceeding. During a hearing, such applications may be made orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to section § 509.26(c) of this subpart.

§ 509.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The transcript shall be made available to any party upon payment of the cost thereof. The administrative law judge shall have

authority to order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion. The administrative law judge shall serve notice upon all parties that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed.

§ 509.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the APA and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Director shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by the appropriate Office or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Director.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 509.37 Proposed findings and conclusions.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days after the parties have received notice that the transcript has been filed with the administrative law judge, unless otherwise ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 509.38 Recommended decision and filing of record.

Within 45 days after expiration of the time allowed for filing reply briefs under § 509.37(b) of this subpart, the administrative law judge shall file with and certify to the Director for decision the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions and proposed order.

§ 509.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 509.38 of this subpart, a party may file with the Director written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Director if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception. (2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 509.40 Review by the Director.

(a) *Notice of submission to the Director.* When the Director determines that the record in the proceeding is complete, the Director shall serve notice upon the parties that the proceeding has been submitted to the Director for final decision.

(b) *Oral argument before the Director.* Upon the initiative of the Director or on the written request of any party filed with the Director within the time for filing exceptions, the Director may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Director's final decision. Oral argument before the Director must be on the record.

(c) *Director's final decision.* (1) Decisional employees may advise and assist the Director in the consideration and disposition of the case. The final decision of the Director will be based upon review of the entire record of the proceeding, except that the director may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Director shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Director orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Director shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Director or required by statute, upon any appropriate state or Federal supervisory authority.

§ 509.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Office may not, unless specifically ordered by the Director or a reviewing court, operate as a stay of any order issued by the Director. The Director may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of the order.

Subpart B—Local Rules

§ 509.100 Scope.

The rules and procedures in this subpart B shall apply to those proceedings covered by subpart A of this part. In addition, subpart A of this part and this subpart shall apply to adjudicatory proceedings for which hearings on the record are provided for by the following statutory provisions:

(a) Proceedings under section 10(a)(2)(D) of the HOLA (12 U.S.C. 1467a(a)(2)(D)) to determine whether any person directly or indirectly exercises a controlling influence over the management or policies of a savings association or any other company;

(b) Proceedings under section 10(g)(5)(A) of the HOLA (12 U.S.C. 1467a(g)(5)(A)) to determine whether to terminate certain activities by savings and loan holding companies or to terminate ownership or control of a non-insured savings and loan holding company subsidiary; and

(c) Proceedings under section 15(c)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. 78o(c)(4)) (Exchange Act) to determine whether any association or person subject to the jurisdiction of the Office pursuant to section 12(i) of the Exchange Act (15 U.S.C. 78*l*(i)) has failed to comply with the provisions of sections 12, 13, 14(a), 14(c), 14(d) or 14(f) of the Exchange Act.

§ 509.101 Appointment of Office of Financial Institution Adjudication.

Unless otherwise directed by the Office, all hearings under subpart A of this part and this subpart shall be conducted by administrative law judges under the direction of the Office of Financial Institution Adjudication, 1700 G Street NW., Washington, DC 20552.

§ 509.102 Discovery.

(a) *In general.* A party may take the deposition of an expert, or of a person, including another party, who has direct knowledge of matters that are non-privileged, relevant and material to the proceeding and where there is a need for the deposition. The deposition of experts shall be limited to those experts who are expected to testify at the hearing.

(b) *Notice.* A party desiring to take a deposition shall give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time and place for taking the deposition and the name and address of the person to be deposed.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than ten days before the scheduled hearing date, except with permission of the administrative law judge for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn, and each party shall have the right to examine the witness with respect to all non-privileged, relevant and material matters of which the witness has factual, direct and personal knowledge. Objections to questions or exhibits shall be in short form, stating the grounds for objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The court reporter shall transcribe or otherwise record the witness's testimony, as agreed among the parties.

(e) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The administrative law judge shall grant such protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, investigative, trial preparation, irrelevant or immaterial matters; or

(3) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent.

(f) *Fees.* Deposition witnesses, including expert witnesses, shall be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States Government is a party. Expenses in accordance with this paragraph shall be paid by the party seeking to take the deposition.

(g) *Deposition subpoenas*—(1) *Issuance.* At the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a deposition. The attendance of a witness may be required from any place in any state or territory that is subject to the jurisdiction of the United States or as otherwise permitted by law.

(2) *Service.* The party requesting the subpoena shall serve it on the person named therein and a copy on that person's counsel, or on that person's counsel, by personal service, certified mail, or overnight delivery service. The party serving the subpoena shall file proof of service with the administrative law judge.

(3) *Motion to quash.* A person named in the subpoena or a party may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party that requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(4) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures of § 509.27(d) of this part.

§ 509.103 Civil money penalties.

(a) *Assessment.* In the event of consent, or if upon the record developed at the hearing the Office finds that any of the grounds specified in the notice issued pursuant to section 509.18 of this part have been established, the Office may serve an order of assessment of civil money penalty upon the party concerned. The assessment order shall be effective immediately upon service or upon such other date as may be specified therein and shall remain effective and enforceable until it is stayed, modified, terminated, or set aside by the Office or by a reviewing court.

(b) *Payment.* (1) Civil penalties assessed pursuant to subpart A of this part and this subpart B are payable and to be collected within 60 days after the issuance of the notice of assessment, unless the Office fixes a different time for payment where it determines that the purpose of the civil money penalty would be better served thereby; however, if a party has made a timely request for a hearing to challenge the assessment of the penalty, the party may not be required to pay such penalty until the Office has issued a final order of assessment following the hearing. In such instances, the penalty shall be paid within 60 days of service of such order unless the Office fixes a different time for payment. Notwithstanding the foregoing, the Office may seek to attach the party's assets or to have a receiver appointed to secure payment of the potential civil money penalty or other obligation in advance of the hearing in accordance with section 8(i)(4) of the FDIA (12 U.S.C. 1818(i)(4)).

(2) Checks in payment of civil penalties shall be made payable to the Treasurer of the United States and sent to the Controller's Division of the Office. Upon receipt, the Office shall forward the check to the Treasury of the United States.

§ 509.104 Additional procedures.

(a) *Replies to exceptions.* Replies to written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order pursuant to § 509.39 of this part shall be filed within 10 days of the date such written exceptions were required to be filed.

(b) *Motions.* All motions shall be filed with the administrative law judge; provided however, once the administrative law judge has certified the record to the Director pursuant § 509.39 of this part, all motions must be filed with the Director within the 10 day period allowed for the filing of replies to exceptions. Responses to such motions timely filed before the Director, other than motions for oral argument before the Director, shall be allowed pursuant to the procedures as § 509.23(d) of this part. No response is required for the Director to make a determination on a motion for oral argument.

(c) *Authority of administrative law judge.* In addition to the powers listed in § 509.5 of this part, the administrative law judge shall have the authority to deny any dispositive motion and shall follow the procedures set forth for motions for summary disposition at § 509.29 of this part and partial summary disposition at § 509.30 of this part in making determinations on such motions.

(d) *Notification of submission of proceeding to the Director.* Upon the expiration of the time for filing any exceptions, any replies to such exceptions or any motions and any ruling thereon, and after receipt of certified record, the Office shall notify the parties within ten days of the submission of the proceeding to the Director for final determination.

(e) *Extensions of time for final determination.* The Director may, *sua sponte*, extend the time for final determination by signing an order of extension of time within the 90 day time period and notifying the parties of such extension thereafter.

(f) *Service upon the Office.* Service of any document upon the Office or the Director shall be made by filing with the individuals and/or offices designated by the Office in its Notice issued pursuant to paragraph (d) of this section, § 509.18 of this part or such other means reasonably suited to provide notice of the person and/or office designated to receive filings.

(g) *Presence of cameras and other recording devices.* The use of cameras and other recording devices, other than those used by the court reporter, shall be prohibited and excluded from the proceedings.

PART 512—[AMENDED]

8. The authority citation for part 512 continues to read as follows:

Authority: Sec. 3, as added by sec. 301, 103 Stat. 278 (12 U.S.C. 1462a); sec. 4, as added by sec. 301, 103 Stat. 280 (12 U.S.C. 1463); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); sec. 9, as added by sec. 301, 103 Stat. 316 (12 U.S.C. 1467); sec. 10, as added by sec. 301, 103 Stat. 318 (12 U.S.C. 1467a); sec. 3, 64 Stat. 873, as amended by sec. 204, 103 Stat. 190 (12 U.S.C. 1813); sec. 12, 48 Stat. 892, as amended (15 U.S.C. 78*l*)

§ 512.7 [Amended]

9. Section 512.7(b) is amended by removing the phrases "Director or any Deputy Director of Enforcement", "Director or the Deputy Director", and "Director or Deputy Director" each place they appear and substituting in lieu thereof the phrase "Chief Counsel or his designee".

PART 513—[AMENDED]

10. The authority citation for part 513 continues to read as follows:

Authority: Sec. 3, as added by sec. 301, 103 Stat. 278 (12 U.S.C. 1462a); sec. 4, as added by sec. 301, 103 Stat. 280 (12 U.S.C. 1463); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); sec. 12, sec. 3, 64 Stat. 873, as amended by sec. 204, 103 Stat. 190 (12 U.S.C. 1813); 48 Stat. 892, as amended (15 U.S.C. 78*l*).

§ 513.1 [Amended]

11. Section 513.1 is amended in the last sentence by removing the number

"§ 509.5(a)(2)" and substituting in lieu thereof, the number "§ 509.6(a)(1)".

§ 513.5 [Amended]

12. Section 513.5(b) is amended by removing "§ 509a.3" and "§ 509a.7", and substituting in lieu thereof, "§ 508.3" and "§ 508.7" respectively.

Dated: August 6, 1991.

By the Office of Thrift Supervision.

Jonathan L. Fiechter,

Deputy Director for Washington Operations.

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